Now, let me turn to the plea of *non est factum* without any element of fraud. The law on this appears to be that where an illiterate alleged to have executed a document denies execution for a certain sum but admits executing a document believed to be for a lesser sum, the onus is on the plaintiff. The initial burden of proving execution when it is denied is upon the person alleging execution. An admission by the defendant regarding signature or thumb mark does not amount to admission of execution of document as to shift the onus of proof on the defendant. This is particularly so when the defendant pleads that he signed a blank document (see *Sarkar* on Evidence, 12th Edition page 893).

From the above, it was pointed out that there was a conflict of opinion as to the burden of proof when a person admits his signature on a document but sets up the defence that he signed it blank and by doing this he relies on the exceptional circumstances and so the burden of proof must rest on him. But in the majority of cases very slight evidence would be necessary (see *Sarkar* on Evidence, 12th Edition page 893).

In the case before me, I do not think that the defendants are fully illiterate. 1st defendant stated she could write and read. The 2nd defendant knows only Jawi script but she also stated she knew what I.O.U. chits were, which she described to be "a letter denoting loan". Both defendants are businesswomen. 1st defendant stated she kept an account book. 2nd defendant could sort out in the court which cheques were dishonoured and which were not. Both of them knew so much about post-dated cheques. Thus, the illiteracy exception does not strictly apply to them. Even if it does, I am of the opinion that the plaintiff has sufficiently proved her case in that the defendants did execute the documents and both of them fully knew the contents and the obligations thereof.

In the circumstances, I gave judgment in favour of the plaintiff as prayed and costs.

Claim allowed.

Solicitors: *P. Dorairaj & Co.*

PUBLIC PROSECUTOR v. YAP KIAN NAM

[A.Cr.J. (Gunn Chit Tuan J.) February 15, 1979]
[Penang — Criminal Appeal No. 26 of 1977]

Gaming — Competition in connection with trade or business — Success depending on chance and not to a substantial degree on skill — Guessing game — Common Gaming Houses Ordinance, 1953, s. 4.

Criminal Law and Procedure — Gaming — Guessing game — Common Gaming Houses, Ordinance, 1953, s. 4.

The respondent conducted a competition at a supermarket called "Guessing the amount (*sic*) of National Batteries." The batteries were mixed with plastic discs. The learned Magistrate acquitted the respondent as he held that the competition did not involve mere guess work but required a certain amount of skill. The Public Prosecutor appealed.

Held: (1) on the facts there was no skill involved in the competition conducted in this case;

(2) it would be an offence under section 4(1)(h)(ii) of the Common Gaming Houses Ordinance, if any competition was conducted in connection with any trade or business where success in it did not depend on the exercise of a considerable amount of skill.

Cases referred to:-

(1) *Arumugam* v. *Rex* [1947] M.L.J. 45.
(2) *Sheo Swarup & Ors.* v. *King a Emperor* (1933-34) L.R. 61 S.A. 398.
(3) *News of the World Ltd.* v. *Friend* [1973] 1 All E.R. 422.
(4) *Witty* v. *World Service Limited* [1936] 1 Ch. D. 303.
(5) *Terry's Motors Limited* v. *Rinder* [1948] S.A.S.R. 167.
(6) *Palser* v. *Grinling* [1948] A.C. 291.

CRIMINAL APPEAL.

Hashim bin Datuk Haji Yusoff (Deputy Public Prosecutor) for the appellant.

Lim Ewe Hock for the respondent.

Gunn Chit Tuan J.: The respondent, Yap Kian Nam, who is the managing director of the Bukit Mertajam Supermarket Sendirian Berhad was charged as follows:—

"That you on October 15, 1974, at the premises of the Bukit Mertajam Supermarket Sdn. Bhd., Bukit Mertajam, in the district of Bukit Mertajam, in the State of Penang, conducted in connection with the business of the said Bukit Mertajam Supermarket Sdn. Bhd., a competition, to wit, 'Guessing the Amount of 'National' Batteries', success in which does not depend to a substantial degree upon the exercise of skill, and that you have therefore committed an offence contrary to and punishable under section 4(1)(h) of the Common Gaming Houses Ordinance, No. 26/53."

The evidence, as recorded by the Magistrate's Court at Bukit Mertajam, shows that since the first of September 1974 the said supermarket at Bukit Mertajam had been conducting a competition called "Guessing the amount (*sic*) of 'National' batteries". When the Acting O.C.P.D. Bukit Mertajam (PW1) raided the supermarket on a search warrant he found that the competition was still in progress and saw a male Indian called Singaraveloo s/o Karuppiah (PW4) writing on some forms at a counter table in the supermarket.

The supervisor of the supermarket called Kuan Liew Choon (PW7), who was also called as a prosecution witness, confirmed that the supermarket had started the said competition on the first of September 1974. The competition rules were printed in three languages, namely Bahasa Malaysia, Chinese and English, on pamphlets (see Exhibit P15B) which were distributed toegther with entry forms similar to the ones which were produced in court and marked Exhibit P15A and P16. One entry form was given to each customer for every purchase of $3.00 and a customer could, according to the amount of his purchases, obtain and submit more than one entry form before the closing date for the competition on December 31, 1974. On each of the entry forms similar to the ones produced, a customer must fill in his name, identity card number and address and there is a space opposite the words "I guess' in which he must fill in the number of batteries, which according to his estimate, is in a plastic container which was seized by the Acting O.C.P.D. and produced in court. (Exhibit P9).

At the close of the case for the prosecution the learned Magistrate quite rightly found on the evidence

recorded by him that there was a *prima facie* case and called on the respondent to make his defence.

The respondent, who elected to give evidence on oath, told the court that he did not dispute the facts given by Kuan Liew Choon (PW7), the supervisor of his supermarket, and also confirmed that each customer was given a form for every purchase of $3.00 and that he could submit as many entry forms as possible. The closing date for the competition was December 31, 1974 and the number of batteries in the said plastic container was to be counted on that date. The respondent also said that the measurements i.e. the length, width and height of the plastic container were written on it, and the batteries in it were of a standard size. He claimed that skill was involved in the competition and that one could calculate mathematically the number of batteries in the plastic container. Under cross-examination he admitted that the competition of guessing the number of batteries was held in connection with his business. He also said that there were plastic discs mixed with the batteries in the plastic container and that the discs were of different sizes. Some of the batteries were partly hidden but some of them could be seen completely. The respondent also admitted that half of the plastic container including part of its top was covered with labels and was not transparent.

After hearing the defence, the learned Magistrate came to the conclusion that it had raised reasonable doubts against the prosecution's case and, having found the respondent not guilty, made an order of acquittal and discharge. The reason for the acquittal and discharge was because, in his opinion, the competition did not involve mere guess-work but required a certain amount of skill. He stated that there was an element of chance but was of the opinion that it was only a minor element and that more skill than chance was required for the competition. He was also of the opinion that because the plastic container was partly transparent one could calculate the number of batteries in it "if one's observation was good and sharp".

The deputy public prosecutor appealed against the order of acquittal and discharge and at the hearing of the appeal, referred to the case of *Arumugam* v. *Rex*[1] and argued that the learned Magistrate's findings of fact and judgment were against the weight of the evidence as recorded by him. He also pointed out, with reference to the rules for the said competition, that the distribution of prizes to winners in this case would be a matter of chance.

Mr. Lim Ewe Hock, counsel for the respondent, on the other hand, referred to the Privy Council case of *Sheo Swarup & Ors.* v. *The King-Emperor*[2] and pointed out that the High Court upon an appeal from an order of acquittal by a lower court should, in exercising its powers to review at large the evidence upon which the order of acquittal was founded, and before reaching its own conclusions of fact, always give proper weight and consideration to such matters as "(1) the views of the trial judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses." Mr. Lim also referred to two English cases. The first case referred to by him was the *News of the World Ltd.* v. *Friend*[3] in which it was held by the British House of Lords that a 'Spot-the-Ball' competition in which the winning competitor was the one whose cross most accurately represents the actual position of the ball in the original photograph taken during an actual football match showing several players in action, would not infringe section 47 of the British Betting, Gaming and Lotteries Act, 1963 which *inter alia* prohibited any competition success in which does not depend to a substantial degree upon the exercise of skill. The other case referred to by Mr. Lim was *Witty* v. *World Service, Limited*[4] in which the competition was advertised in a newspaper in which a money prize was offered to the reader sending in the best solution of a picture puzzle illustrated in the same issue. The puzzle consisted of a set of nine small sketches each intended to depict the name, as spelt or pronounced, of some place in the United Kingdom. A list of names providing clues was given. Competitors were required to fill in blank forms with their solutions and send them in to the editor with entrance fees. The artist who drew the sketches was instructed to make some of them capable of representing one or other of two or three different places. In an action brought to test the legality of the competition, Eve J. held that success in the competition depended on the exercise of a substantial degree of skill, there being no predetermined solution of the puzzle and therefore it did not come within the prohibition contained in the relevant section of the former British Betting and Lotteries Act, 1934.

With respect, I considered that the facts in the two British cases quoted by Mr. Lim were different from the facts in this appeal. The said Privy Council decision of *Sheo Swarup & Ors.* v. *The King-Emperor* should, of course, be followed in an appeal such as this against an acquittal by a Magistrate on questions of facts. But bearing in mind the principles referred to by their Lordships in that Privy Council case, and having reviewed all the evidence in this case, I had no hesitation in coming to the conclusion that the respondent in this case ought to have been convicted. With respect, I could not agree with the opinion and findings of the learned Magistrate and found on the facts of this case that there was no skill involved in the competition conducted by the respondent in connection with his business at the said supermarket. In this case, although it was possible to calculate the cubic capacity of the said plastic container (Exhibit P9) as well as to find out the size of the batteries put into it, yet it was impossible to know the actual number or the different sizes of the plastic discs which, the respondent admitted, were mixed with the batteries in the plastic container. Therefore, in my view, it was only possible for anyone to guess the number of batteries in the said plastic container and there was no skill at all involved in making such guesses.

In order that there be no offence committed under section 4(1)(h)(ii) of the Common Gaming Houses Ordinance No. 26/53, success in any competition must

be dependent to a substantial degree upon the exercise of skill. According to a South Australian Court in the case of *Terry's Motors Limited* v. *Rinder*,[5] "substantial" is "a word of no fixed meaning; it is an unsatisfactory medium for carrying the idea of some ascertainable proportion of the whole". In the British House of Lords' case of *Palser* v. *Grinling*[6] Viscount Simon said of the word "substantial" in connection with the phrase "substantial portion" as follows:—

"One of the primary meanings of the word is equivalent to considerable, solid, or big. It is in this sense that we speak of a substantial fortune, a substantial meal, a substantial man, a substantial argument or ground of defence."

Therefore, in my view it would be an offence under the said section 4(1)(h)(ii) of the Common Gaming Houses Ordinance, if any competition is conducted in connection with any trade or business where success in it did not depend on the exercise of a considerable amount of skill.

As I was satisfied that the learned Magistrate's judgment was against the weight of the evidence as recorded in the case, I therefore allowed the appeal and reversed his order of acquittal and discharge. I found the respondent guilty of the offence as charged and convicted him accordingly and imposed a fine of $500 in default one month's imprisonment.

Appeal allowed.

Solicitors: *Lim Ewe Hock & Co.*

CHANG FOOK SHEN v. TAN SUAN SIM

[O.C.J. (Gunn Chit Tuan J.)
November 6, 1978 & February 19, 1979]
[Penang — Civil Suit No. 290 of 1973]

Land Law — Conveyancing — Agreement for sale of land — Balance of purchase price to be paid at later date — Completion — Whether time essence of contract — Specific Performance — Undesirability of same solicitor acting for both vendor and purchaser — Specific Relief Act, 1950, s. 23.

Contract — Sale of land — Specific Performance — Specific Relief Act, 1950, s. 23.

The defendant agreed to sell to the plaintiff her land and house. The plaintiff paid the sum of $2,000 as deposit and it was agreed that the balance of the purchase price was to be paid at a later date. The plaintiff had to obtain a bank loan but it appeared that the loan could not be released until the transfer was executed. The defendant insisted on payment of the balance before execution of the transfer and demanded payment "on or before June 10, 1974" failing which the defendant purported to cancel the contract. The plaintiff applied for specific performance of the agreement.

Held: the defendant in this case was in a position to perform the contract and should have been given reasonable time to do so. In the circumstances specific performance of the contract should be ordered.

Cases referred to:-

(1) *Ong Kim Khoon* v. *Gaya Filem Berhad* [1979] 1 M.L.J. 79.
(2) *Jennings* v. *Zihari-Kiss* [1972] 2 S.A. S.R. 493.
(3) *James* v. *Smith* [1931] 2 K.B. 317, 332.
(4) *Smith* v. *Hamilton & Anor.* [1951] 1 Ch. D. 174, 179.
(5) *S. Ayadurai* v. *Lim Hye* [1959] M.L.J. 143, 144.
(6) *Killner* v. *France* [1946] 2 All E.R. 83, 86.
(7) *Palmer* v. *Lark* [1945] Ch. D. 182, 194, 195.
(8) *Green* v. *Sevin* 13 Ch. D. 589, 599.
(9) *Re Barr's Contract* [1956] Ch. D. 551, 556.
(10) *MacBryde* v. *Weekes* (1856) 22 Beav. 553, 543.
(11) *Hexter* v. *Pearce* [1900] 1 Ch. D. 341, 346.
(12) *Rudd* v. *Lascelles* [1900] 1 Ch. D. 815, 818.

CIVIL SUIT.

R.J. Manecksha (*Ajmer Singh Sandhu* with him) for the plaintiff.

Ho Sen Feek for the defendant.

Cur. Adv. Vult.

Gunn Chit Tuan J.: This was a claim for specific performance, or alternatively for damages for breach, of an agreement in writing dated July 14, 1973, which was prepared by the parties themselves by which the defendant, a business woman, agreed to sell to the plaintiff, a school teacher, her land and hereditaments comprised in Title No. 529 and known as Lot 609 Mukim 18 North-East District, Penang, together with the house thereon bearing No. 38 Fettes Road, Penang (hereinafter referred to as "the said property") at the price of $34,500. On signing the said agreement a sum of $2,000 was paid by the plaintiff as deposit and to account of the said purchase price of $34,500. It was provided in the said agreement that the balance of the purchase price was to be paid at a later date.

In his evidence in chief, the plaintiff (PW2) explained that by "a later date" it was meant that they had to wait until he got a bank loan. He had approached the Chartered Bank for a loan before July 10, 1973 and this was confirmed by a 'Valuation for mortgage' dated July 14, 1973 prepared by Messrs. C.H. Williams and Company (Sendirian), chartered surveyors, valuers and estate agents (see page 1 of agreed bundle of documents marked 'A') wherein it was stated that acting on instructions received from the Chartered Bank, Beach Street, Penang dated July 10, 1973, they had inspected 38 Fettes Road, Penang for the purpose of preparing a valuation. Under cross-examination, the plaintiff said that he was sure of getting a loan which was approved in July 1973, but final payment could only be made when the bank's lawyers, Messrs. Presgrave and Matthews, released the loan. He confirmed that he did tell the defendant about the said loan when the said agreement was prepared.

The plaintiff also called his solicitor, Mr. Ajmer Singh Sandhu (PW1), to give evidence. Mr. Ajmer Singh Sandhu told the court that he had acted for both the plaintiff and the defendant some time in 1974. At that time he did explain to the defendant that the plaintiff was negotiating for a bank loan which was then forthcoming. He had also explained to the defendant that she would have to execute a transfer before the said loan was available to the plaintiff to enable him to pay her the balance of the purchase price. The defendant was at that time agreeable to payment of the balance of the purchase price after the Chartered Bank's solicitors have approved and released the loan to the plaintiff. According to Mr. Ajmer Singh the said loan was released to him in June 1974 subject to his undertaking not to release it to the defendant until a transfer had been executed by her as the vendor. The title deed of the said property was left with him by the defendant when he applied for a loan on behalf of the plaintiff.